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Preemption Analysis After Geier v. American Honda Motor Co.

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Preemption Analysis After *Geier v. American Honda Motor Co.*

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I. INTRODUCTION

Federal preemption of state claims forms a crucial defense in many product liability cases. Such preemption can foreclose plaintiffs' remedies or greatly reduce the types and amount of damages that plaintiffs can seek.[1] Preemption can also keep a litigant out of state court.[2] In addition, conventional wisdom says that federal juries are more frugal with damages and that federal judges are more favorable to defendants.[3] As a result, product manufacturer defendants have an enormous incentive to seek preemption, and plaintiffs have an enormous incentive to keep their claims from being preempted.

Traditionally, preemption analysis has been based on the three categories set forth by the Supreme Court in the 1912 case of *Savage v. Jones*:[4]

> (1) express preemption, where Congress explicitly defines the extent to which its enactments preempt state law; (2) field preemption [also known

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[1] *See, e.g.*, Wood v. Gen. Motors Corp., 865 F.2d 395, 402 (1st Cir. 1988) (holding that a state common-law defective design claim against an automobile manufacturer for failure to provide airbags was preempted by the National Traffic and Motor Vehicle Safety Act).

[2] *See, e.g.*, Massey Burge v. Jones, No. B-92-022, 1992 U.S. Dist. LEXIS 21208, at *7-8 (S.D. Tex. Nov. 18, 1992). *But see, e.g.*, Kagan v. Carwell Corp., No. CV-01-00852, 2001 U.S. Dist. LEXIS 4544, at *12 (C.D. Cal. Mar. 30, 2001).

[3] *See generally* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992) (discussing how plaintiffs report a perceived bias for defendants in the federal system resulting in lower verdicts and increased pressure to accept settlements).

[4] Savage v. Jones, 225 U.S. 501(1912).

> as implied preemption], where state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy; and (3) conflict preemption, where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.[5]

Little more than these three categories has stayed constant in the last nine years, however. The Supreme Court has revisited its preemption analysis no fewer than four times since 1992.[6] Because preemption can play a large role in the logistics and ultimate disposition of a case, litigants must remain abreast of this evolving doctrine. This could be a difficult task until the early 1990s because of the complicated and sometimes arbitrary preemption analysis that the Supreme Court mandated.[7]

In 1992, however, the Supreme Court decided *Cipollone v. Liggett Group, Inc.*[8] and provided a welcome respite for litigants. The test set forth in *Cipollone* was predictable and easy to apply—an amazing feat considering preemption doctrine's reputation as having "logical, theoretical and practical difficulties."[9] Part of this reputation was a result of the Court's emphasis on implied preemption, a doctrine that allowed broad judicial discretion in determining congressional intent.[10] Such broad discretion made for an unpredictable test and raised serious federalism concerns.[11] These difficulties made *Cipollone* a judicial breath of fresh air. In *Cipollone* the Court relinquished some of its broad discretion in favor of a textualist approach to federal legislation and preemption—looking to what Congress said to determine what Congress intended.[12]

Unfortunately, the relief litigants enjoyed under *Cipollone* did not last long. In May, 2000, when the Supreme Court decided *Geier v. American*

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[5] Indus. Truck Ass'n v. Henry, 125 F.3d 1305, 1309 (9th Cir. 1997).

[6] *See* Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000); Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996); Freightliner Corp. v. Myrick, 514 U.S. 280 (1995); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[7] *See* Mary J. Davis, *Handling Preemption Questions After* Geier v. American Honda Motor Company, PRODUCT LIABILITY ADVISORY, July 2000, at 1-2.

[8] *Cipollone*, 505 U.S. at 504.

[9] S. Candace Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 687, 700 (1991).

[10] *Id.*

[11] *See* discussion *infra* Part II.A.

[12] *See* discussion *infra* Part II.B.

Honda Motor Co.,[13] it once again complicated preemption analysis, rendering it even more trying than before. As some commentators have noted, however, the problem did not start with *Geier*.[14] In the ten years prior to *Geier*, the Supreme Court's preemption decisions placed a steadily declining emphasis on express preemption analysis, with it finally being abandoned completely in the *Geier* decision.[15] In recognition of this trend, some commentators called for a simpler test.[16]

This Note argues that *Geier* does not represent such a test. More specifically, it argues that the Supreme Court's decision in *Geier* unnecessarily muddles preemption analysis by retreating from its prior emphasis on express preemption and by replacing it with a complicated implied preemption analysis that is statute specific, thereby necessitating Supreme Court decisions for each federal statutory scheme in order for litigants to know the current state of the law.[17] As a result of these difficulties, this Note advocates returning to the *Cipollone* analysis when Congress has spoken via an express preemption provision. To that end, Part II discusses the history of preemption analysis, specifically focusing on the trio of decisions handed down in the 1990s: *Cipollone v. Liggett Group, Inc.*,[18] *Freightliner Corp. v. Myrick*,[19] and *Medtronic, Inc. v. Lohr*.[20] Part II also details how the Court has strayed progressively farther from its express preemption analysis as set forth in *Cipollone*.[21] Part III discusses the facts, procedural history, and the Court's analysis in the *Geier* decision.[22] Part IV discusses problems with *Geier*, including the federalism issues raised and how a more logical system of preemption flows from the *Cipollone* doctrine.[23] This Note concludes with suggestions on how litigants facing preemption questions post-*Geier* should approach the test under the analysis currently mandated by the Supreme Court.[24]

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[13] Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

[14] *See* Susan Raeker-Jordan, *The Pre-emption Presumption that Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1380 (1998).

[15] *See* discussion *infra* Part II.

[16] *See* Raeker-Jordan, *supra* note 14, at 1380.

[17] *See* discussion *infra* Part IV.A.

[18] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[19] Freightliner Corp. v. Myrick, 514 U.S. 280 (1995).

[20] Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

[21] *See infra* Part II.B-D.

[22] *See infra* Part III.

[23] *See infra* Part IV.

[24] *See infra* Part V.

II. PREEMPTION ANALYSIS BEFORE *GEIER*

A. History and Description of the Types of Federal Preemption

Federal preemption of state laws is derived from the Supremacy Clause of the United States Constitution, which provides: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land .... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[25] The principle that Congress possesses supreme power over state lawmaking bodies is limited by the equally fundamental principle that states have inherent police powers in which the federal government ought not to interfere.[26] As a result of these "inherent" police powers, there exists an often-cited presumption against preemption, in recognition of the deference that should be given state legislatures to enact laws for the health and safety of their citizens.[27] Tension resulting from these conflicting sources of power has placed courts in the uncomfortable position of balancing the need for deference to state lawmaking authority with Congress's ability to pass laws that are, by definition, superior to those of the states. The Supreme Court's discomfort with the matter is perhaps best expressed in its difficulty in formulating a workable preemption doctrine.[28]

In spite of this difficulty, the Supreme Court's definitions of the three types of federal preemption have been widely accepted by courts and commentators for over eighty years.[29] As previously noted, preemption analysis can fall into one of three categories: field preemption, conflict preemption, or express preemption.[30] Field preemption arises when Congress has regulated in a particular field to such an extent that it is reasonable to assume that it intended no other legislation to coexist.[31] In other words, Congress has left no room for other legislation to exist. As one commentator has noted:

> If federal law has so occupied the field, even state laws which are consistent with or supplementary to the federal law are invalid, because Congress has impliedly taken exclusive control of the subject. In addition,

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[25] U.S. CONST. art. VI, § 1, cl. 2.

[26] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[27] *See id.*; *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

[28] *See* Raeker-Jordan, *supra* note 14, at 1383.

[29] The Court returned to the categories set out in *Savage v. Jones*, 225 U.S. 501 (1912) in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 867 (2000).

[30] *See supra* note 5 and accompanying text.

[31] *See supra* note 5 and accompanying text.

> when Congress has so occupied the field but failed to legislate concerning the particular aspect of the field, a state may not, consistent with preemption doctrine, legislate on that aspect.[32]

In contrast, conflict preemption exists where state laws and congressional legislation cannot be harmonized. That is, conflict preemption is found where state law conflicts with federal legislation or "frustrates the purposes and objectives of Congress in enacting the federal law."[33] On the other hand, express preemption applies where Congress has specifically addressed preemption and has provided for the circumstances in which state laws are preempted by federal legislation.[34]

When a court finds that a state law has been preempted in any of these three ways, plaintiffs are precluded from bringing their state law claims. This is true whether the claims are common-law causes of action or state statutory claims.[35] Thus, if a claim is found to be preempted, plaintiffs' only remedy is through federal law, in federal court.

From the 1912 birth of preemption as a tool used by the courts, until the 1992 decision of *Cipollone v. Liggett Group, Inc.*,[36] courts have had difficulty articulating just when Congress had preempted state law.[37] The difficulty was formulating an implied preemption test that could be applied to different statutory schemes and determining how the need for deference to traditional state police power should be balanced against the federal government's right to create uniform laws.[38] Finally, in *Cipollone*, the Court articulated a workable analysis—not by utilizing the implied preemption doctrine, but by using an express preemption analysis.[39]

B. Cipollone v. Liggett Group, Inc.: *The High Point of Preemption Analysis*

Before 1992, federal preemption of state common-law damages actions was analyzed under implied preemption doctrines.[40] Implied preemption

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[32] Timothy Wilton, *Federalism Issues in "No Airbag" Tort Claims: Preemption and Reciprocal Comity*, 61 NOTRE DAME L. REV. 1, 12 (1986).

[33] *Id.*

[34] *Id.* For an example of an express preemption provision, see 21 U.S.C. § 360k(a) (1998).

[35] *See* Wilton, *supra* note 32, at 17.

[36] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[37] For a discussion of the history of preemption doctrine and the Court's struggle with it, see Raeker-Jordan, *supra* note 14, at 1384-99.

[38] *See id.* at 1386-87.

[39] *See Cipollone*, 505 U.S. at 517.

[40] Davis, *supra* note 7, at 2.

doctrines are problematic for several reasons. First, they give judges discretion that is too broad, resulting in inconsistent application of the doctrine. As Professor Mary Davis has noted, "implied preemption doctrines leave ample room for litigants and trial judges to manipulate the unspoken intent of Congress to preempt state law, and have been widely criticized on that basis."[41] Because of the potential for manipulation and abuse, it is difficult for litigants to predict how implied preemption will be applied in any individual case.

Furthermore, under implied preemption, the fundamental goal of fair, predictable law is frustrated.[42] This broad discretion raises federalism concerns as well. By manipulating congressional intent to suit their own purposes, judges run afoul of the founding principle that the proper role of the legislature is to legislate, while the proper role of the judiciary is to apply the laws created by the legislature.

Perhaps as a result of these problems, use of implied preemption analysis began to decline with Justice Stevens's opinion in *Cipollone v. Liggett Group, Inc.*[43] That case involved the Federal Cigarette Labeling and Advertising Act and Amendments ("FCLAA"). The plaintiff, the surviving spouse of a long-time smoker,[44] sued cigarette manufacturers alleging common-law breach of express warranty, fraud and misrepresentation, conspiracy, and failure to warn claims.[45] The task for the Court was to determine whether either the 1965 FCLAA or its 1969 amendments preempted the plaintiff's claims.[46] The Court began its preemption analysis by saying, "the purpose of Congress is the ultimate touchstone."[47] To determine Congress's intent, the Court first turned to the language of section 5, the preemption provision of the 1965 Act, which states:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

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[41] *Id.*

[42] *See* Raeker-Jordan, *supra* note 14, at 1452.

[43] *Cipollone*, 505 U.S. at 504.

[44] Rose Cipollone and her husband were the initial plaintiffs. After Rose's death in 1984, her husband filed an amended complaint. The couple's son maintained the action after his father's death. *Id.* at 509.

[45] *Id.*

[46] *Id.* at 508.

[47] *Id.* at 516 (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[48]

Regarding the 1965 preemption provision, the Court said, "Congress spoke precisely and narrowly: 'No *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes.' "[49] Noting that because "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions,"[50] the Court held that "the term 'regulation' most naturally refers to positive enactments . . . not to common-law damages actions."[51] Thus, the Court held, state common-law damages actions were not preempted under the 1965 Act.[52]

The Court then turned to the 1969 amendment to the Act, holding that its language was broader and barred not simply "statement[s] but rather 'requirement[s] or prohibition[s] . . . imposed under State law.' "[53] The language of the 1969 Act is as follows: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."[54] The Court found that state law damages actions based on the existence of a legal duty often do impose "requirements or prohibitions" and thus, can be preempted.[55]

The Court then turned to the specific state law actions brought by the plaintiff and, using the express language of the statute along with the presumption against preemption, determined that the plaintiff's breach of warranty claims, " 'though made with respect to . . . advertising' . . . do[ ] not rest on a duty imposed under state law" and thus, were not preempted.[56] In addition, the Court held that the plaintiff's conspiracy claim, which rested on a duty not to conspire to commit fraud, was not preempted because it was not a prohibition "based on smoking and health."[57] Finally,

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[48] *Id.* at 514 (quoting 15 U.S.C. § 1334 (1982 version)).
[49] *Id* at 518.
[50] *Id.*
[51] *Id.* at 519.
[52] *Id.* at 519-20.
[53] *Id.* at 520.
[54] 15 U.S.C. § 1334 (1998).
[55] *Cipollone*, 505 U.S. at 522.
[56] *Id.* at 526-27.
[57] *Id.* at 529-30.

the Court held that the plaintiff's fraudulent misrepresentation claim, in which he asserted that the defendants were " 'negligent in the manner [that] they tested, researched, sold, promoted, and advertised' their cigarettes," was not preempted because the claim was not related to the defendant's advertising practices.[58]

The Court held that section 5 of the Act did, however, preempt the plaintiff's first fraudulent misrepresentation claim, which was "predicated on a state law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking."[59] That claim alleged that the defendants' advertising "neutralized the effect of federally mandated warning labels."[60] The Court also held that "insofar as claims under either failure-to-warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated warnings, those claims are pre-empted"[61] to the "extent that they rely on a state-law 'requirement or prohibition . . . with respect to . . . advertising or promotion' "[62] within the meaning of section 5b.

This simple, logical conclusion represents the high point of preemption analysis. With its *Cipollone* decision, the Court simplified what was a confusing and difficult test to apply and replaced it with one that does not disrupt the delicate balance between federalism and Supremacy Clause concerns. The test as summarized by Justice Stevens in *Cipollone* is as follows:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.[63]

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[58] *Id.* at 524-25.

[59] *Id.* at 527.

[60] *Id.*

[61] *Id.* at 524. Actions instituted for failure to warn include claims that the defendants were negligent in the manner that they tested, researched, sold, promoted, and advertised their cigarettes, or that they failed to provide adequate warnings of smoking's consequences. *Id.*

[62] *Id.*

[63] *Id.* at 517 (citation omitted) (quoting Malone v. White Motor Corp., 435 U.S. 497, 505 (1978); *see also* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 282 (1987)). This test became law because Stevens's opinion was joined in its

The Court also stated, "In this case there is no 'good reason to believe' that Congress meant less than what it said; indeed, in light of the narrowness of the 1965 Act, there is 'good reason to believe' that Congress meant precisely what it said in amending that Act."[64] Analyzing what Congress has actually said when it has spoken on the subject of preemption is the best possible way to determine congressional intent, which is, after all, the "touchstone of preemption analysis."[65]

C. Freightliner Corp. v. Myrick: *A Step Away From* Cipollone

The Supreme Court did not hear another preemption case for three years after *Cipollone*. Then, in *Freightliner Corp. v. Myrick*,[66] a case involving a design defect claim against an anti-lock brake manufacturer, the Court unanimously held that the plaintiffs' state law design defect claims were not preempted.[67] The case arose out of two separate, but nearly identical, accidents. In the first, the plaintiff, Ben Myrick, was brain damaged and rendered a paraplegic when a tractor-trailer, unable to stop quickly, jack knifed into oncoming traffic.[68] The second action was brought on behalf of Grace Lindsay after she died from injuries sustained in a head-on collision with a jack-knifed truck.[69] Neither truck in the two cases was equipped with an anti-lock braking system ("ABS").[70] Both plaintiffs brought design defect claims, which the defendants removed to federal court.[71]

Defendants Freightliner and Navistar argued that the claims were preempted under a safety standard, known as Standard 21, promulgated by the National Highway Traffic Safety Administration ("NHTSA"), which imposed stopping distances and vehicle stability requirements for trucks.[72] The underlying Act, the National Traffic and Motor Vehicle Safety Act of 1966,[73] contained a preemption provision which provided:

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entirety by Justices Rhenquist, White, and O'Connor and was joined in Parts I-IV (sections containing the test) by Justices Blackmun, Souter, and Kennedy.

[64] *Id.* at 522.

[65] *Id.* at 516 (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

[66] Freightliner Corp. v. Myrick, 514 U.S. 280 (1995).

[67] *Id.* at 289.

[68] *Id.* at 282.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 283.

[72] *See* 36 Fed. Reg. 3817 (1997).

[73] 15 U.S.C.S. §§ 1381-1397 (1993) (originally enacted Pub. L. No. 89-563, 80 Stat. 718 (1966) (repealed 1994)). The underlying Act delegated authority to NHTSA to promulgate standards.

> Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.[74]

In addition, the Act had a saving clause which provided: "Compliance with any Federal motor vehicle safety standard issued under this title does not exempt any person from any liability under common law."[75] Congress generally puts such a clause in legislation when it wants to make clear that state common-law actions are *not* preempted.[76] Hence, the clause is called a "saving clause" because common-law actions are "saved" or not preempted. In spite of the presence of a saving clause, however, the district court held that the claims were impliedly preempted.[77] The court of appeals reversed and held that under *Cipollone* implied preemption cannot exist where a statute has an express preemption clause.[78]

On review, in an opinion that began the trend of eroding *Cipollone*, the Supreme Court addressed the holding of the court of appeals, saying, "The fact that an express definition of the pre-emptive reach of a statute 'implies'—i.e., supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption."[79] The Court also stretched dicta in Justice Stevens's *Cipollone* opinion, noting, "Indeed, just two paragraphs after the quoted passage in *Cipollone*, we engaged in a conflict pre-emption analysis of the Federal Cigarette Labeling and Advertising Act . . . and found 'no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions.' "[80] The two paragraphs referred to in *Cipollone*, in fact, do not represent a conflict preemption analysis, but rather, provide support for the Court's conclusion that express

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[74] *Id.* § 1392(d).

[75] *Id.* § 1397(k).

[76] *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 493 (1987).

[77] Myrick v. Freuhauf Corp., 795 F. Supp. 1139 (N.D. Ga. 1992).

[78] Myrick v. Freuhauf Corp., 13 F.3d 1516 (11th Cir. 1994).

[79] Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995).

[80] *Id.* at 288-89 (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992)).

preemption analysis is the appropriate means of determining congressional intent where Congress has spoken. The paragraph to which the *Freightliner* Court refers reads, in part:

> Beyond the precise words of these provisions, this reading [of the actual words of the statute] is appropriate for several reasons. First, . . . we must construe these provisions in light of the presumption against . . . pre-emption . . . . Second, the warning required . . . does not by its own effect foreclose additional obligations imposed under state law. That Congress requires a particular warning label does not automatically pre-empt a regulatory field . . . . Third, there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions.[81]

This paragraph is merely an affirmation of the *Cipollone* Court's express preemption analysis. By noting that Congress's purposefully chosen, narrowly tailored words were not inconsistent with already settled principles of statutory construction and preemption doctrine, the *Cipollone* Court countered the dissent's argument that the express provision ran afoul of the preemption principle that state common-law actions can never coexist alongside federal warning requirements.[82]

The *Freightliner* Court went on to hold that the "implied versus express preemption" issue was of no consequence. The plaintiffs' common-law actions were not in conflict with federal law as a result of the ruling of the Ninth Circuit Court of Appeals that the safety standard was "not reasonable nor practicable" and the standard's subsequent suspension by the NHTSA.[83] Thus, no federal regulation existed that could conflict with the state law claims.

This represents an erosion of *Cipollone*'s core principle—an implied preemption analysis is unnecessary where Congress has spoken on the matter.[84] Oddly, although the *Freightliner* Court acknowledged that *Cipollone* could support an *inference* that an express preemption clause forecloses implied preemption, the Court did not interpret *Cipollone* as establishing such a *rule*.[85] By dismissing *Cipollone*'s core principle as an

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[81] *Cipollone*, 505 U.S. at 518.

[82] *Id.* at 534 (Blackmun, J., dissenting).

[83] *Freightliner*, 514 U.S. at 285 (quoting Paccar, Inc. v. NHTSA, 573 F.2d 632, 640 (1978)).

[84] *See* discussion *supra* Part II.B.

[85] *Freightliner*, 514 U.S. at 289.

inference, the *Freightliner* Court set the stage for implied preemption to swallow express preemption analysis once again. Furthermore, the Court also left the saving clause question unanswered. The reader is left to wonder whether the saving clause would have played a role in foreclosing implied preemption analysis had the safety standard not been suspended.

D. Medtronic, Inc. v. Lohr: *Increasing the Court's Distance From* Cipollone

The third decision in the preemption trilogy of the 1990s, *Medtronic, Inc. v. Lohr*,[86] took yet one more step away from the *Cipollone* test. Express preemption was again the Court's first focus. The case involved a design defect and failure to warn claim under the Medical Device Act ("MDA") amendments.[87] The plaintiff was injured when her pacemaker failed.[88] The pacemaker had been approved under a special FDA provision allowing for pro forma approval as long as the device was similar to others already approved.[89] Medtronic, the pacemaker manufacturer, argued that since the FDA had approved the device, the plaintiff's claim was automatically preempted by the MDA amendments' preemption provision,[90] which states:

> (a) Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
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> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
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> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.[91]

The district court dismissed the defendant's summary judgment motion on the basis that no evidence indicated that the claims were preempted.[92] The Eleventh Circuit Court of Appeals held that at least some of the claims were preempted and remanded to the district court, which then dismissed

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[86] Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).
[87] *Id.*
[88] *Id.* at 481.
[89] *Id.* at 480.
[90] *Id.* at 481.
[91] 21 U.S.C. § 360k(a) (1994).
[92] *Medtronic*, 518 U.S. at 482.

all of the plaintiff's claims as preempted under the MDA.[93] The court of appeals then reversed in part and affirmed in part, holding that state common-law actions are state requirements under § 360k(a).[94]

The Supreme Court, in another opinion written by Justice Stevens for a plurality of the Court, acknowledged again that Congress's intent is the "ultimate touchstone" and is primarily discerned from the language of the preemption statute and the statutory framework surrounding it.[95] Justice Stevens went on to emphasize the relevancy of the structure and purpose of the statute as a whole, "as revealed *not only in the text,* but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."[96] This is an even more disturbing departure from *Cipollone* than that of *Freightliner*. With this, the Court had all but abandoned the express preemption analysis set forth in *Cipollone* and had opened the door to replacing it with full-scale implied preemption analysis in which judges once again attempt to discern congressional intent that cannot be found on the face of the congressional legislation in question. Courts again would be able to manipulate their implied preemption analysis to reach any desired conclusion, perhaps influenced by a particular court's pro-plaintiff or pro-defendant leanings. The federalism issues raised are obvious.

The Court attempted to ameliorate its departure by distinguishing *Cipollone* on the basis that a finding of preemption in *Medtronic* would deprive plaintiffs of redress for many medical devices in existence.[97] In contrast, the Court said that "[t]he pre-emptive statute in *Cipollone* was targeted at a limited set of state requirements—those 'based on smoking and health.' "[98] Thus, the Court held that "requirement," as used in the MDA, had a different meaning than "requirement," as used in the Cigarette Act, and found that the claims were not preempted.[99]

Though the Court again emphasized express preemption analysis, this, like the *Freightliner* decision, undeniably represents a chipping away at the vitality of the *Cipollone* preemption test. Worse yet, the Court's hybrid *Cipollone* analysis raises several questions. For example, how does the

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[93] Lohr v. Medtronic, Inc., 56 F.3d 1335 (11th Cir. 1995).
[94] *Id.*
[95] *Medtronic*, 518 U.S. at 485.
[96] *Id.* at 486 (emphasis added).
[97] *Id.* at 487.
[98] *Id.* at 488.
[99] *Id.* at 470.

reviewing court reach its "reasoned analysis?" Does it wade through stacks of legislative hearing transcripts to put itself in Congress's position at the time the law was passed? More importantly, why should the Court assume that Congress was unable to articulate what it really meant in the statute? With these questions still unanswered, the Court made its final leap away from *Cipollone*'s logical, simple test to the slippery banks of implied preemption analysis.

III. THE SUPREME COURT'S DECISION IN *GEIER*

A. The Geier *Facts and Procedural History*

In 1992, Alexis Geier's 1987 Honda Accord struck a tree, injuring her.[100] She was wearing a seatbelt, but her car was not equipped with an airbag.[101] She and her parents sued Honda, the manufacturer, for defective design because of the lack of airbags.[102] The district court dismissed the lawsuit, holding that the 1984 version of Federal Motor Vehicle Safety Standard ("FMVSS") 208 preempted the claims by giving manufacturers a choice in installing airbags.[103] The express preemption portion of the FMVSS is as follows:

> Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.[104]

The FMVSS also contained a saving clause, which stated, "Compliance with any Federal motor vehicle safety standard issued under this title does not exempt any person from any liability under common law."[105] The district court held that because the plaintiffs' claim purported to establish a different safety standard than that set forth in FMVSS 208, the claim was

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[100] Geier v. Am. Honda Motor Co., 529 U.S. 861, 865 (2000).
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] 15 U.S.C. § 1392(d) (1993) (repealed 1997).
[105] *Id.* § 1397(k).

expressly preempted.[106] The court of appeals affirmed, saying that the state law damages action conflicted with FMVSS 208 and thus, under implied conflict preemption analysis, the claims were preempted.[107] The court of appeals, unlike the district court, was concerned about the saving clause; however, it declined to reach the issue of whether common-law damages actions could be considered safety regulations where a saving clause exists.[108]

B. The Supreme Court's Express Preemption and Saving Clause Analysis

The Supreme Court began by correctly applying the *Cipollone* analysis to the facts of the case: "We first ask whether the Safety Act's express preemption provision pre-empts this tort action."[109] Honda argued that the Court should use its construction of the word "requirement" in *Medtronic* to find that the similar "safety standard" as used in the wording of the statute included common-law damages actions.[110] The plaintiffs argued that a safety standard is different than a "requirement" and, under *Cipollone*, does not preempt state common-law damages actions.[111]

The Court rejected both claims, holding that in light of the saving clause, construction of the words "safety standard" was not necessary.[112] The Court noted that without the saving clause, a broad reading of the express preemption provision was possible and the common-law claims could be preempted.[113] Thus, the Court used the saving clause to avoid the operation of such a broad reading and held that "[t]he language of the preemption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the preemption clause must be so read."[114] Up to this point, the Court's analysis did not conflict with the analysis set out in *Cipollone* because the *Cipollone* statute did not have a saving clause. Furthermore, this was a good start towards a reasoned interpretation of the saving clause. The Court should

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[106] *See* Geier v. Am. Honda Motor Co., Civ. No. 95-CV-0064 (D.D.C., Dec. 9, 1997).

[107] *Geier*, 529 U.S. at 865-66.

[108] Geier v. Am. Honda Motor Co., 166 F.3d 1236, 1238-43 (D.C. Cir. 1999).

[109] *Geier*, 529 U.S. at 867.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 867-68.

[113] *Id.* at 868.

[114] *Id.*

have gone even further, however, and held that the phrase "safety standard" does not refer to or apply to common-law actions.[115] It is illogical to read the words "safety standard" as used in the express preemption provision to mean state common-law actions when Congress enacted a later saving clause provision that specifically saves state common-law actions. The words "safety standard" have a meaning entirely apart from "state common-law actions." This distinction should have been acknowledged.

Still, at this point in the Court's opinion the result is correct. The word "standard" has a clear, common definition and refers to safety standards promulgated by state agencies. There is no reason to give it any other meaning. The later-enacted saving clause in no way conflicts with this. It is also clear on its face: state common-law actions are still valid. What is troubling, however, is that the plain meaning of the express preemption provision should have been analyzed in order to reach this conclusion. Instead, the Court notes that this holding does not conflict with its decision in *Freightliner*, which left the saving clause question open.[116]

Unfortunately, the Court did not stop there. It then revived its implied preemption analysis, saying that the result of the express preemption provision and the saving clause was to create a neutral policy towards preemption—in effect, they cancelled each other out.[117] The Court concluded that "the saving clause . . . does *not* bar the ordinary working of conflict pre-emption principles."[118] This was an unnecessary detour. The Court had already reached the correct result. There was no reason to drag implied preemption into the opinion to complicate the analysis for the *Geier* litigants and all subsequent litigants with preemption claims. As the dissent notes, "The Court contends . . . that a saving clause cannot foreclose *implied* conflict pre-emption. The cases it cites to support that point, however, merely interpreted the language of the particular saving clauses at issue and concluded that those clauses did not foreclose implied pre-emption."[119]

The Court also rejected the dissent's assertion that the express preemption provision combined with the saving clause creates a special

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[115] *But see* Wilton, *supra* note 32, at 22 (noting that courts have consistently and compellingly argued that saving clauses should not be read literally to allow all state common-law tort actions because this could effectively lead to the nullification of federal laws).

[116] *Geier*, 529 U.S. at 872-73.

[117] *Id.* at 869.

[118] *Id.*

[119] *Id.* at 900 n.16 (citation omitted) (Stevens, J., dissenting).

burden on the party claiming implied, conflict preemption.[120] Ironically, the Court rejected this claim on the basis of the increased system-wide costs that would accrue "as courts tried sensibly to distinguish among varieties of 'conflict' . . . when applying this complicated rule to the many federal statutes that contain some form of an express pre-emption provision, a saving provision, or as here, both."[121] As the Court said, "Nothing in the statute suggests Congress wanted to complicate ordinary experience-proved principles of conflict pre-emption . . . . We would not further complicate the law with complex new doctrine."[122] Yet that is exactly what the Court has done in bringing back its old implied preemption analysis. The *Cipollone* test was simple and easily applied: when Congress has spoken, its words control.[123] Though the Court's return to implied preemption analysis in *Geier* does not represent new doctrine, it certainly and needlessly does complicate the law.

C. *The Court's Implied Preemption Analysis*

The Court began its implied preemption analysis by examining the possible existence of conflict preemption, stating the basic question as "whether a common-law 'no airbag' action like the one before [them] actually conflicts with FMVSS 208."[124] First, the Court looked to the Department of Transportation's ("DOT") explanation of FMVSS 208, noting that it reflected "significant considerations."[125] Among these considerations were the effectiveness of seatbelts when used and the disadvantages of passive restraint systems, including increased automobile cost, increased replacement cost, and potential public resistance to airbags.[126] The Court pointed out that "DOT now tells us . . . the 1984 version of FMVSS 208 'embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car.' "[127] Thus, the Court determined that a state law imposing a tort duty

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[120] *Id.* at 872-73.

[121] *Id.* at 874.

[122] *Id.*

[123] *See* discussion *supra* Part II.B.

[124] *Geier*, 529 U.S. at 874.

[125] *Id.* at 877.

[126] *Id.* at 877-78.

[127] *Id.* at 881 (quoting Brief of Amicus Curiae of the Association of Trial Lawyers of America at 25, Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (No. 98-9811)).

to install an airbag would have presented an obstacle to the statute's purpose of obtaining a variety of passive restraint systems in automobiles.[128]

It is easy to see the Court's problem. Intuitively, a state law action requiring airbags seems incongruous with a federal statute specifically allowing manufacturers to choose if they want to include airbags in their automobiles. Perhaps it was in part this dilemma that drove the Court to abandon its more reasoned *Cipollone* analysis. Critics might argue that courts should not be expected to yield to congressional intent when Congress has enacted a law such as this, which says that manufacturers have a choice in installing airbags and yet allows manufacturers to be held liable under state law for not installing airbags. As the dissent notes, however, this argument is premised on a

> fundamental misconception of the nature of the duties imposed by tort law. A general verdict of liability in a case seeking damages for negligent and defective design . . . does not amount to an immutable, mandatory rule of state tort law imposing . . . a duty . . . [T]he Court is quite wrong to suggest that, as a consequence of such a verdict, only the installation of airbags would enable manufacturers to avoid liability in the future.[129]

As Professor Davis argues:

> It is not difficult at all to understand why Congress would write a savings clause in a way that focuses on only those who comply with the federal regulation: because those who do not comply have no claim to federal protection in the first place. Congress can choose to provide that those who have obeyed a federal requirement are, nonetheless, unprotected from traditional principles of common law compensation mechanisms.[130]

In addition, allowing courts to go outside of Congress's express provisions to search for the true meaning of Congress's words would disrupt the delicate balance of power between legislatures and courts, as arguably it

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[128] *Id.* at 878.

[129] *Id.* at 902-03 n.18 (Stevens, J., dissenting).

[130] Davis, *supra* note 7, at 4; *see also* Miranda v. Fridman, 647 A.2d 167, 174 (N.J. Super. Ct. App. Div. 1994) ("Admittedly, adopting such a reading renders the savings clause partially redundant. However, that is a lesser offense than adopting a reading that renders the clause contrary to a principal purpose of Congress.").

did in the years between the Court's first preemption decision and its decision in *Cipollone*.[131]

Perhaps the Court is unwilling to adhere to its *Cipollone* analysis because express preemption analysis is much more difficult for the Court to control and does occasionally lead to results that seem illogical at first glance. Implied preemption analysis, on the other hand, gives the Court much more control over the outcome. The value of this to the Court can be seen in *Geier*. The Court's correct express preemption analysis led to an undesirable result, apparently inducing the Court to "fix" the result via an implied preemption analysis in which it could attribute intent on the part of Congress consistent with what the Court viewed as the correct outcome.

IV. WHERE DOES *GEIER* TAKE US AND CAN WE EVER GET BACK?

A. Problems With the Geier *Decision*

The *Geier* decision is the final word on how saving clauses and express and implied preemption provisions interact.[132] The Court's holding that implied preemption analysis is not foreclosed even where a saving clause is present and its finding that the plaintiffs' claims were impliedly preempted are problematic for several reasons. The decision presents a logical difficulty in understanding why the saving clause would save the common-law action from the express preemption provision but not from implied preemption analysis. In addition, the implied preemption analysis raises serious federalism concerns. A founding principle of this nation is that the legislative branch of the government, with greater resources to conduct hearings and to sift through research, creates laws. Yet, after *Geier*, federal courts will be free to manipulate implied preemption analysis, resulting in judge-made law that is, at best, "not precisely defined"[133] and ill-considered. As a result of the unlimited discretion that judges now have in analyzing preemption issues, litigants are afforded no certainty in how preemption analysis will be applied to their cases.[134]

Furthermore, this problem is compounded by the fact that the Court's analysis is so specific to the FMVSS's provisions that neither courts nor future litigants will have any tools for applying the analysis to different

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[131] *See* discussion *supra* Part II.A-B.

[132] *See* Davis, *supra* note 7, at 4.

[133] *Geier*, 529 U.S. at 887 (Stevens, J., dissenting).

[134] *See* Brief of Amicus Curiae of the Association of Trial Lawyers of America, Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (No. 98-9811).

regulations. This raises the question: Is the Court planning to hand down a decision for every federal statutory regulation scheme? The *Cipollone* analysis, in contrast, is easily applied to any federal regulation. Furthermore, it respects the right of Congress to enact legislation that will be interpreted on its face and fairly applied in courts.

B. How the Court Should Have Decided Geier

The Court should have stayed true to its simpler, well-reasoned analysis in *Cipollone*. Under the *Cipollone* analysis, the Court would have first determined if the express preemption provision applied to the plaintiffs' state law claims.[135] In order to do this properly, the Court should have determined if the word "standard" had the same meaning as the word "requirement" and if it included common-law actions, as it had in previous cases.[136] While the Court in *Geier* did give a cursory examination of the express preemption clause, holding that it did not preempt the claim in light of the saving clause—a logical and well-reasoned result—it skipped an important step: it should have analyzed the word "standard."[137] More importantly, the Court should have adhered to its rule in *Cipollone*: implied preemption analysis is improper where a saving clause exists. Had the Court applied the analysis correctly, it would have found that the plaintiffs' common-law cause of action was not preempted.

V. CONCLUSION: HOW DO CURRENT LITIGANTS HANDLE THE POSSIBILITY OF PREEMPTION AFTER *GEIER*?

After *Geier*, litigants bringing or facing preemption claims must be prepared to meet the demands of an implied preemption analysis. Unfortunately, no one can be sure what such an analysis will hold until the ink is dry on the particular court's opinion. There are still some certainties to help litigants, however.

First, under *Geier* (as well as *Freightliner*[138] and *Medtronic*[139]) the Court's nearly ninety-year-old categories survive. Thus, now, as before,

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[135] *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); *see also* discussion *supra* Part II.B.

[136] *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 486-88 (1996).

[137] *Geier*, 529 U.S. at 867-69.

[138] *See* discussion *supra* Part II.C.

[139] *See* discussion *supra* Part II.D.

litigants can expect to have their claims analyzed under field (implied), conflict, and express preemption doctrines.[140] Unfortunately, little more has stayed constant in preemption analysis over the last ten years and litigants can expect even more changes, particularly if the Court continues its recent trend of handing down a new decision every few years on a different federal statutory scheme.[141]

Second, if there is an express preemption provision, litigants can expect that it will be used as a starting point for the Court's preemption analysis, but that implied and conflict analysis will supplement the express analysis. Because the implied analysis is so easily manipulated, litigants can expect the express preemption analysis to be swallowed by the more flexible implied analysis. After all, if a court does not like the outcome under the express analysis, it is free, after *Geier*, to grope for Congress's true intent through legislative history until it reaches a more satisfactory result. While *Geier* could have changed the trend towards implied preemption analysis and reinstated *Cipollone* nicely with its saving clause and express preemption provision, it did not. Consequently, implied preemption now stands as the rule.

Finally, litigants can expect that saving clauses will be of little force post-*Geier*. If a litigant faces a statute with a saving clause as well as an express preemption provision, the court has precedent available that allows it essentially to disregard both if the court deems that doing so would lead to Congress's intended result. As Professor Davis notes,

> What is the focus of . . . implied preemption analysis? . . . Whatever the trial judge wants it to be. Artful litigants will be wise to look closely at the history of the regulation in question and to support preemption by articulating a narrow federal objective with which the common law damages action at issue is sure to conflict.[142]

Conversely, litigants who hope that a court will find that federal law does preempt the state law claims at issue should argue Congress's statutory objectives broadly and recognize that they have a powerful ally in the Court's latest articulation of preemption doctrine.

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[140] *See* discussion *supra* Part II.A.

[141] *See Geier*, 529 U.S. at 861; *Medtronic*, 518 U.S. at 470; Freightliner Corp. v. Myrick, 514 U.S. 280 (1995); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[142] *See* Davis, *supra* note 7, at 6.